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Protecting Montana's water for future use: Water reservation history status and alternatives

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PROTECTING MONTANA'S WATER FOR FUTURE USE:

WATER RESERVATION HISTORY, STATUS AND ALTERNATIVES

By

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". . . where the sun beats
And the dead tree gives no shelter, the cricket no relief,
And the dry stone no sounds of water
. . . I will show you fear in a handful of dust."
--Eliot: "The Waste Land"

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The need to protect unappropriated waters in the major geographic basins of Montana for future consumptive and non-consumptive uses is recognized as a major responsibility of the state in the control of its water resources. The history of the development of the water reservation concept shows a process which incrementally recognized and confirmed the duty of the state to protect the public interest in the use of the state's waters. Adoption of water reservations for the Yellowstone Basin in 1978 was an important move toward future management and control of water use in the Basin. The continuing progress in actual utilization of reserved water in the Yellowstone Basin indicates the success of the Montana Water Reservation System.

State policy makers are currently working to find the best way to protect future water use in the Missouri River Basin. The complex water use situation in the drainage makes the question of how much water is actually available to protect a foremost concern. The uncertainty about present water availability suggests that protective measures for future uses will require further study before any action can be taken.

A variety of options available to the state to set aside water for future uses extend beyond the present water reservation system. Research into appropriate alternatives will involve inventorying possible developments in the Missouri Basin and examining the effectiveness of each alternative in protecting Montana's water in an interstate setting. While a protection mechanism should be developed and implemented in the near future, management decisions made now on the issue of water marketing should not affect the future application of a protection scheme.

DESCRIPTORS: Montana; Streamflow; Water Allocation (Policy); Decisionmaking; Yellowstone River Basin; Water Reservation; Missouri River Basin; Instream Flow Protection; Water Use; Water Protection Strategies; Wyoming; Yellowstone River Compact; Water Law

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CHAPTER 1

INTRODUCTION

The management and use of existing and potential water supplies are topics of critical importance to Montana today. The availability of water has profoundly affected the physical and social organizations which have developed in the state. Historic use of water for human consumption, irrigation, industry, transportation, recreation and power generation helped shape the way of life Montanans have come to enjoy.

Water is crucial to every type of human endeavor; indeed to human life itself. Water resources in Montana, while somewhat renewable, are limited. This being so, the question of how to use these resources, both now and in the future, is debated by almost everyone with a fanatical zeal. Decisions made concerning the protection and utilization of Montana's waters are rarely unanimous.

Some feelings about water, however, are commonly held by most Montanans. One of these beliefs is that the water in the state's rivers is "ours" and should be protected against claims made on it by "them". Call the attitude self-serving. Call it naive. Call it just plain stupid, but don't for a minute think that Montanans are about to abandon this attitude. It's part of Montana's heritage.

Since the early 1900's, Montana has developed a system of law concerning water use which is similar to those in other western states. One aspect unique to Montana water law is the existence of statutes that allow reservation of water today for preferred uses in the future.

The implementation of this system in the Yellowstone River Basin of Montana in 1978 was unprecedented in United States history. The continuing saga of how Montana makes the system work and how well reservations actually protect the state's waters is worth constant attention by all those interested in Montana's future.

The need to adapt the protection concept activated by the Yellowstone River Reservations to other basins in the state is commonly acknowledged. The Missouri River Basin is a likely candidate for state-initiated protection in light of recently perceived threats to Montana's future water development. Water marketing discussions, downstream states' claims to large flow volumes for nonconsumptive use, unquantified federal and Indian reserved water rights in the Basin and conflicting instate demands on the available water combine to raise serious questions about future economic and environmental protection options for the Missouri River Basin.

For Montana to make wise decisions on the many water use options it faces, it is necessary to monitor and critically evaluate not only in-state situations, but also changes in regional and neighboring states' thinking on water use situations affecting Montana. This paper has been prepared to discuss some of the water issues which are of interest to anyone involved with water policy decisions. Vigilance will be rewarded with important insights about what Montana's neighbors are thinking and what the state may need to do to assure that avenues for future water development remain open.

Any water management decisions made by Montana about the preferred future uses of its water must be made after researching and

weighing all available strategies in light of both state and federal law. This writer believes that the steps Montana has taken in the past toward protecting its water resources have shown wisdom, imagination, initiative and fortitude. I also believe the next steps, particularly those taken to protect future uses in the Missouri Basin, deserve further study before they are taken. The need to protect future water use does not forestall the decision currently being contemplated by the state on water marketing. How to protect water resources and preserve Montana's quality of life is the real question, not when.

CHAPTER 2

HISTORICAL DEVELOPMENT OF THE WATER RESERVATION CONCEPT IN MONTANA

The concept of water reservations in Montana is often viewed as a relatively new idea precipitated by the influx of water use applications by energy companies submitted to the state in the mid-1970s. Although this situation did result in a temporary moratorium on new water appropriations and the currently existing reservations present in the Yellowstone Basin, the reservation of water for specific uses has a much broader historical base in Montana.

To the Montanan, water has always been the one natural resource worth fighting for. One story goes that the first murder committed after Montana received statehood took place on Burnt Fork Creek in the Bitterroot Valley as two irrigators "discussed" their rights at the headgate. The survivor pleaded "justifiable homicide" and the case went to the Supreme Court.[1]

With the drought of 1917-1921, Montanans began to realize that the water that fell on our state, and eventually flowed from it, was the lifeblood of the state's mainstay economy, agriculture. Drought tested the mettle of the agricultural community and alerted the state's leaders to the fact that internal solutions to water supply problems and their devastating effects on the populace would have to be found. The attitude of outsiders towards the drought situation in Montana is exemplified by the writings in the Minneapolis Daily News which said: "Don't

pity Montana . . . The wealth is there in a soil so rich and productive that you could just about take a sack of it to a bank in Belgium and draw interest on it." All Montanans had to do was stop complaining and "hang on, keep a stiff upper lip."[2]

In the mid-1920s, the rain returned. Survivors of the drought again tasted the prosperity that comes with ample water. But 1929 brought the Depression and the beginning of a new, more severe drought. Remembering the lack of federal or regional assistance in the earlier drought, the 1931 legislature created the Mississippi Valley Water Conservation Commission and charged it to cooperate with other states in the development of water projects not only in Montana but in the entire Mississippi Valley. To accomplish the monumental task, the legislature appropriated only $2,000 for the 1931-32 biennium.[3]

Responding to the nationwide depression and the initiation of work programs by the federal government, Montana's Governor Cooney approached President Roosevelt with the idea of allowing Montana to proceed with a federally funded Water Conservation project program with funds made available through the Public Works Administration.[4] Assured by the President that if Montana would enact the necessary legislation Washington would cooperate, Governor Cooney called a special session of the legislature in late 1933 with one of its prime purposes being this legislation. On January 9, 1934, the Governor signed House Bill 39 into law and thus created the State Water Conservation Board (SWCB).[5]

The main purpose of the creation of the SWCB was to promote public welfare and protect the public interest by selecting and con-

structing water storage and distribution projects. From its inception, the SWCB was given authority to file water appropriation documents on all unappropriated waters of the state for uses in future projects.[6] As a direct result, the SWCB legislative reports claimed that as of 1960, their program represented "the state's investment in the development of its water resources". The SWCB went on to say that its program "preserves for Montana a prior right to use water for its projects as against claims which might subsequently be made for water used by downstream states."[7] This statement serves to illustrate the early role state government played in the reservation of water for future use in the public interest.

Reservations of water for purposes other than agriculture also have a historical record in Montana. Several laws in existence prior to the passage of the 1973 Water Use Act acted in part to reserve stream flows for various purposes. As early as 1955, the State Water Pollution Council established a classification system for Montana's waters and set criteria for maintaining established water quality.[8] This classification system was compiled in compliance with a 1947 statute passed in response to municipal concerns about the declining quality of Montana's domestic water.[9] Updated after the passage of the 1965 Water Quality Act by Congress, these classifications are still utilized by the state in protecting water quality standards for designated beneficial uses.

The statutory forerunners of instream reservations for fish and wildlife uses began to appear in the early 1960s. Historically, the state has managed fisheries with an eye toward protecting and enhancing trout production. In 1962, the Montana Fish and Game Department por

trayed the importance of this resource in terms of sheer economic impact by stating that at that time, fishermen spent over $36 million pursuing their sport.[10] They also stated that:

> "Montana is losing good trout stream habitat at an alarming rate. Stream straightening, dam building, channel changing, pollution, siltation, irrigation and overgrazing of stream banks by livestock are all taking their toll. Trout stream habitat is going "down the drain" so fast that we cannot even adequately inventory the losses."[11]

Responding to the potential economic loss to the state, the state's Jaycee organization lobbied for legislation with the end result being the passage of the 1963 Stream Preservation Law. In 1965, the legislature saw fit to give the statute permanent status.[12] This law requires any state agency or subdivision of the state which plans a water development project with the potential to change the existing natural streambed to first notify the Fish and Game Commission. If the change would "adversely affect" any fish or game habitat, the Commission can require modification of the plans. Arbitration procedures are also provided for. Although this law specifically exempts any State Water Board or irrigation project from its provisions, it can still be viewed as a step toward recognition of the public interest involved in fish and wildlife flows. It also illustrates early legislative thinking concerning the protection of stream flows as an essential component of fish and wildlife habitat.

The Stream Preservation Law of 1965 did not address the question of whether the public could acquire a prior right to a stream as a fishery resource by using it for that purpose, but that question was soon addressed by the Montana Supreme Court.[13] As of 1966, the court maintained that this type of a public right could not presently be established, but indicated that such a public interest should be recog-

language:

> "The [Fish and Game] Commission does not deny that DePuy has a valid appropriate right to the waters of Armstrong Spring Creek. In fact the Commission made no attempt to prove that the amount of water actually put to a beneficial use by DePuy was less than the amount claimed and diverted. The Commission does maintain that the public has a prior right in the waters of the creek which would require DePuy to release some water through a fishladder. The public right urged by the Commission would be based on the fact that the public had used the creek as a fishing stream and natural fish hatchery before Depuy built his dam. Under the rule of *Bullerdick vs. Hermsmeyer*, 32 Mont. 541, 554, 81 P. 334, DePuy could not use the water to the detriment of prior rights.
>
> Such a public right has never been declared in the case law of this state. California, an appropriation doctrine jurisdiction, whose Constitutional provisions relating to water rights are virtually the same as Article III, 15 of the Montana Constitution, has recognized such a right and has upheld statutes requiring fishways. People v. Glenn-Colusa Irr. Dist., 127 Cal. App. 30, 15 P.2d 549. Under the proper circumstances we feel that such a public interest should be recognized. This issue will inevitably grow more pressing as increasing demands are made on our water resources. An abundance of good trout streams is unquestionably an asset of considerable value to the people of Montana.[14]

During the 1969 legislature, Representative James E. Murphy sponsored House Bill 450 which eventually granted the Fish and Game Commission the authority to appropriate unappropriated waters on twelve streams designated by the statute in amounts necessary to maintain in-stream flows for the preservation of fish and wildlife habitat. Testimony heard during February of 1969 hinted at the concept of protecting these fisheries, reflecting both economic and public interest concerns.[15] To a question from Representative Schoonover concerning the intent of the legislation, Representative Murphy responded that this bill would establish a priority "for maintenance of minimum stream flow to protect fish habitat."[16] With the signing of what is now commonly known as "Murphy's Law" by the Governor in 1969 and the subsequent filings for

water rights on the twelve designated streams, Montana was finally in the reservation business.

As early as 1971, Montana enjoyed the reputation of being an aggressive leader among the states in protecting its waters for future in-state uses.[17] Key policy shapers at the time were discussing potential downstream threats to our water resources as well as intrastate problems with preserving fish and wildlife and agricultural resources.[18] Enacting some sort of system to preserve Montana's water for the future was uppermost in the minds of agency personnel as the 1970s dawned. Public awareness of the threats to our water was blossoming and executive branch leaders felt impelled to work toward a system which would protect the public interests of all Montanans.

Development of the 1973 Water Use Act

On May 1, 1972, the newly organized Montana Water Law Advisory Council held their inaugural meeting in Helena.[19] Organized in response to the requirements of the new Montana Constitution (Article IX, Section 3)[20], this nine-member council had been charged to review existing water law and recommend changes in those laws for introduction in the 1973 legislature. From the discussions and suggestions of the committee, the water reservation system as we now know it was born.

From May of 1972 to January of 1973, the Water Law Advisory Council debated the future of Montana Water Law. On September 29, 1972, working with Draft 3 of the proposed law, the Council held extensive discussions on the reservation doctrine, minimum flows, the

Blue Ribbon Streams Law (Murphy's Law), water use with or without diversion, and the definition of beneficial uses.[21] The Council directed the Department of Natural Resources and Conservation (DNRC) to prepare Draft 4 and further address the question of reservations.

In the first two weeks of October, 1972, the Advisory Council's staff hammered out a system which would have given reservations the same status as water "rights."[22] Draft 4 of the proposed legislation suggested this approach and was criticized by the Council members for its inclusion at the October 30, 1972 meeting. After lengthy discussion, the Council members agreed that, although the reservation concept was apparently sound, reserved waters should not be given the status of "rights." They also decided that only public agencies should be permitted to reserve waters for minimum flows and other beneficial uses without requiring a diversion. The consensus of the Council was to add a Water Reservation section to Draft 5 which recognized the reservation of water as a valid appropriation of the state's waters.[23]

Draft 5 of the Montana Water Use Act was presented to the citizens of Montana in November of 1972. At public hearings in Missoula, Billings, Miles City, Glasgow, Great Falls and Bozeman the people of Montana first discussed the proposed new water law. Comments concerning the reservation language were few, but those received were generally supportive.[24] Draft 5 eventually became Senate Bill 444 and was introduced in the Legislature just ten months after the formation of the Montana Water Law Advisory Committee. Senate Bill 444 as signed by the Governor became Montana's 1973 Water Use Act.

Although many people today consider the 1973 water reservation law a significant break from past practices, many individuals concerned with current water use practices were probably not surprised at all. The historical trend hinted at in the earlier laws mentioned here seemed to point toward reservations as a logical development for Montana's water law. Prior to these developments, there had been a 1967 Legislature directive for Montana's Water Resources Board to develop a state water plan.[25] This planning effort reflected a recognition that the state's water resources would be subject to increasing pressures. If the public interest was to be protected, a central plan would be needed for future development and conservation of the state's waters. For the State Water Plan to be of any value, it would be necessary for the state to have a mechanism in place to make future use fit the plan. Otherwise the plan would be useless. The Montana reservation system not only provided a method of developing a comprehensive basin water use plan, but also gave the state a means of implementing a state water plan.[26] Apparently without realizing it, Montana had been looking for just such an instrument since the drought of 1917.

The Yellowstone River Basin Reservation Process

The reservation system provisions in the 1973 Water Use Act were not long in place before Montana realized the immediate need to move forward with the reservation of water in the Yellowstone Basin. One day in 1974, a water rights specialist for the Department of Natural Resources and Conservation (DNRC) looked at the stack of water right applications for energy development in the Yellowstone Basin and

decided to do some figuring. Punching the numbers into his desktop calculator resulted in a clear picture of the apparent large-scale water demand soon to be put on the Yellowstone River system by industry.[27] It became obvious that if the basin was to be managed for future developments in agriculture and protected as a fishery, immediate action had to be taken to protect the drainage.

In light of these large industrial applications, the legislature in 1974 took action authorized by Article IX of the Montana Constitution[28] and imposed a three-year moratorium on the Yellowstone Basin.[29] During this period, the DNRC was to determine existing rights on the river and establish reservations "as rapidly as possible for the preservation and protection of existing and future beneficial uses."[30] This moratorium put a hold on any action concerning major new water use permits[31] on the Yellowstone and, upon approval of any reservations, recognized the resultant reserved flows as superior to any rights granted to new or suspended permit applications.

The Water Moratorium Act of 1974 provided Montana with the chance to plan the future use of Yellowstone Basin water by making use of the existing reservation law. Pursuant to this law, the DNRC eventually received 35 applications from public entities for reservations of water in the Yellowstone Basin. On December 13, 1976, the DNRC issued a two-volume draft environmental impact statement for public comment[32], followed in February of 1977 by a revised final environmental impact statement.[33] At the time it was anticipated that the Board of Natural Resources and Conservation (the Board) would make final determinations on the applications by the end of the three-year morator

um: March 18, 1977. It has been suggested that "only a reading of the accounts of the eventual Board proceedings on these reservation applications will illustrate how incredibly absurd the March, 1977 deadline was."[34]

Because of the complexity of the task facing the Board, the legislature extended the Yellowstone Moratorium until January 1, 1978.[35] The extension language included an important caveat which allowed the moratorium to be stretched even further until January 15, 1979.[36] With the additional extension automatically enacted because of court activity, the Board of Natural Resources and Conservation finalized the Yellowstone Reservations on December 15, 1978.[37]

Under the 1973 Water Use Law, state and federal agencies as well as political subdivisions of the state could apply to the Board to reserve water for existing or future beneficial uses, or to maintain a minimum flow, level or quantity of water. This seven-member citizen board faced an unprecedented task in establishing reservations in the Yellowstone Basin. Over the period of the moratorium, they examined numerous technical studies, a substantial draft and final environmental impact statement, and sat through a seven-week public hearing.[38] Acting under the administrative rules previously established for reviewing reservation requests,[39] in October, 1978, the Board began its arduous task of quantifying and prioritizing future reservations.

Suffice it to say that the Board members had their work cut out for them. Faced with partially complete applications, no precedent for water reservations of this sort, unquantified Indian and federal reserved water rights, uncertainty in the Yellowstone Compact allocations, un-

quantified pre-1973 water rights and requests for more water than was physically available, solutions appeared virtually impossible. But by the end of 1978, Montana had its first major basin with water reservations.[40]

In the final Board order of December 15, 1978, the Board attempted to deal with all the problems of conflicting demand in the following way. The Board divided the basin in half and established priorities according to the time each order was signed to try to balance the requests of municipalities, agriculture, instream advocates (both agricultural and environmental), and multi-purpose (storage) applicants.

A point of division was established at the mouth of the Bighorn River and the priorities established are as follows: First priority granted to municipal reservations, signed at 1230 hours; second priority granted to minimum flow reservations above the mouth of the Bighorn River (excluding the Bighorn River watershed), signed at 1613 hours; third priority granted to irrigation reservations, signed at 1618 hours; fourth priority granted to minimum flow reservations below the mouth of the Bighorn River (including the Bighorn River watershed), signed at 1621 hours; and fifth priority granted to multi-purpose reservations, signed at 1623 hours.[41]

The Board's decision was not without controversy. Since the final Board order, changes have been made in the reservation statute to limit future instream reservations to a maximum of 50 percent of the average annual flow of record on gauged streams.[42] A second amendment allows the Board to modify existing or future orders reserving water for minimum flow or quality so as to "reallocate such reservation or portion

thereof to an applicant who is a qualified reservant" without affecting the priority date of the reservation.[43] Another 1979 change required individuals seeking to use water from a conservation district reservation to apply to the district, which must in turn inform DNRC. This language also required DNRC to maintain records and to provide technical administrative assistance to the conservation districts in these matters.[44] All of the changes in the reservation law appear to be responses to the Board's implementation of the Yellowstone Reservations and in each case appear to be compromises to avoid litigation which might have led to the invalidation of the entire Yellowstone proceedings.[45]

Current Status of the Yellowstone Reservations

Issuance of the final Board Order establishing the Yellowstone Reservations marked the beginning of the action sequence involving the utilization of reserved waters. As one Board member put it, now "the monkey is on the applicant's back."[46] Since Montana's statutes require a review of all reservations at least once every ten years, it is essential that reservants actually put the water to use if their reserved rights are to remain intact.

In order to spur action on the part of the reservants, the Board required each to draw up plans within set time limits. In each case, the reservants, were given one year to submit mandatory annual progress reports.[47] For agricultural reservants, detailed plans of development were required five years down the line with annual reports continuing during the interim.[48] The stated purpose of these requirements

was to "show significant progress in one or more areas such as planning, engineering, or gathering more data than the sometimes sketchy data base of the application."[49]

To utilize the final reservations (see Table 1), it became necessary for the various agencies granted reserved water to begin actual administration of their portion of the Yellowstone flow. Department of Fish, Wildlife and Parks annual progress reports submitted between 1979 and 1983 begin with the development of methodologies for defining instream flows and progress over the five-year period to a listing of the completed instream flow quantifications in the basin.[51] Municipal, agricultural and multipurpose reservants, due to the nature of their uses, followed a somewhat different avenue to complying with the Board Order. Using the conservation districts as a case study best shows how that process has progressed.

Each of the fourteen Conservation Districts in the Yellowstone Basin received an agricultural reservation in December of 1978. When the Board order was issued, the concept of administering water reservation system for agricultural use had been virtually unexamined. As a result, numerous questions arose concerning the wording of the Board order and the actual implementation of reservations envisioned for agricultural use. During 1980 and 1981, the Board held various discussions concerning such issues as administrative rule adoption, required developmental plans and actual water availability in the Upper Yellowstone Basin.[52] Clarifications of intent and language made during this period, were instrumental in the final approval of Conservation District development plans.

TABLE 1

Summary of Applications and Allocations Yellowstone River Basin

Applicant	Source	Total Amount Requested	Total Amount Allocated	Water Use
FGC[1]	Yellowstone-Livingston	935,007[2]	1,879,013	Instream Flow[3]
FGC	Yellowstone-Billings	4,041,913	3,914,455	Instream Flow
FGC	Yellowstone-Miles City	7,876,889	5,578,892	Instream Flow
FGC	Yellowstone-Sidney	8,206,723	5,492,310	Instream Flow
FGC	Large Tributaries	4,610,717	4,065,523	Instream Flow
FGC	Small Eastern Tributaries	11,094	Historic Min. Flows	Instream Flow
FGC	Small Western Tributaries	376,221	Varies	Instream Flow
FGC	Small Western Tributaries	Instantaneous Flows	Varies	Instream Flow
DHES[4]	Yellowstone-Billings	3,184,000	3,914,455	Water Quality
DHES	Yellowstone-Miles City	5,015,000	5,578,892	Water Quality
DHES	Yellowstone-Sidney	6,643,000	5,492,310	Water Quality
BLM[5]	Yellowstone + Tributaries	21,498	20,400	Irrigation
BOR[5]	Bighorn River	131,700	Denied	Irrigation
Five CDs[6]	Bighorn River	286,240	207,764	Irrigation
Three CDs	Lower Yellowstone River	159,942	159,942	Irrigation
Three CDs	Lower Yellowstone + Tributaries	231,963	151,883	Irrigation
Three CDs	Lower Yellowstone + Tributaries	131,006	45,172	Irrigation
Two IDs[7]	Yellowstone River	151,807	11,997	Irrigtaion
DSL[8]	Yellowstone River Tributaries	67,403	55,646	Irrigation
Billings	Yellowstone River	317,456	41,229	Municipal
Other Towns	Yellowstone River	73,445	19,079	Municipal
BOR	Yellowstone River	725,800	729,500	Storage
DNRC	Tongue River	450,000[6]	383,000[9]	Storage
One CD	Yellowstone-Kinsey	4,000[6]	4,000[9]	Instream Flow
One CD	Small Eastern Tributaries	5,000[6]	2,500[9]	Small Reservoirs
BLM	Yellowstone River	144,795	Denied	Instream Flow
BLM	Large Tributaries	300,449	2,172	Instream Flow
BLM	Small Eastern Tributaries	43,336	13,014	Instream Flow
BLM	Small Western Tributaries	25,340	Denied	Instream Flow

1 Fish and Game Commission.
2 All figures acre-feet except where noted.
3 Water quality, fish, wildlife, recreation.
4 Department of Health and Environmental Sciences.
5 Bureau of Reclamation
6 CD - Conservation District.
7 ID - Irrigation District.
8 Department of State Lands.
9 Cubic feet per second.

Source: Montana DNRC, 1978.

As the governmental entities charged with the administration of a reserved water use system, the Conservation Districts found themselves clearly understaffed and inexperienced. Faced with a December 15, 1981 due date for their detailed plans,[53] the conservation districts lacked the necessary manpower, expertise and money to formulate these plans. To help remedy this situation, the 1981 legislature passed House Bill 494 to assist the conservation districts with the Board-ordered progress on reservations. Prior to the passage of HB 494, DNRC had requested funding to provide administrative and technical assistance to the districts in developing the plans. By late 1981, DNRC had hired irrigation specialists attached to the Water Development Bureau who were placed in Miles City and Billings to assist both the Lower and Upper Basin conservation districts.

Since finishing plans of development in less than a year seemed to be impossible, considering the nature of the work to be performed, the Board, pursuant to provisions in the initial order,[54] granted all irrigation, multipurpose and municipal reservants an eighteen-month extension for submission of plans.[55] During the eighteen months preceding July 1, 1983, plans of development containing detailed administrative procedures and technical review mechanisms were developed for Board approval. During this period, the DNRC also researched the crucial question of water availability in the Basin.[56] As of July, 1983, all detailed plans had been reviewed and approved by the Board. The approved plans, in all but two cases, are based on the same quantities of reserved flows initially granted to the reservants.

Of the two changes in quantity authorized by the Board, one involving municipal water for Billings and one concerning instream flows in the Upper Basin, the modification of the instream reservation appears most significant. Approved in November, 1980, this change reduces the instream flow from the 65th percentile flow to the 83rd percentile flow. What this means to agriculture in the Upper Basin is that flows in excess of the instream reservation can now be expected in 83 out of 100 years.[57] The negotiation process among agricultural interests, instream reservants and the DNRC which led to this change bodes well for the ability of the reservation system to cope with future changes in the Basin.

With approved, detailed development plans in place, the Conservation Districts of the Basin have begun the process of authorizing reserved water use for agricultural purposes. Progress has been quickest in the Lower Basin where agriculture has priority over instream flows, but Upper Basin reservants have not been idle. Currently a total of 15,742 acre-feet out of a possible 655,324 acre-feet reserved for agricultural use Basin-wide has been approved for development by the Board.[58] This progress reflects well on the efforts of all involved with the agricultural reservations.

One last item to consider in the current picture in the Yellowstone Basin is the group of multipurpose rights granted by the Board. Totalling 1,111,500 acre-feet annually, these reservations were made for proposed future storage by the U.S. Bureau of Reclamation and the DNRC. With these reservations in effect, study by the Bureau of Reclamation continues on the viability of three offstream storage reservoirs

on the Yellowstone and the the State further examines enlargement of the Tongue River Dam. The development of any of these sites, with the resulting 1978 priority date due to the reservations, could be important in whatever water marketing strategy is adopted by Montana in the future.

FOOTNOTES FOR CHAPTER 2

1. Mark D. O'Keefe, "Water", Ravalli Republic Transition 80 (Spring 1980): no pagination.

2. K. Ross Toole, Twentieth-Century Montana: A State of Extremes (Oklahoma: University of Oklahoma Press: 1972): 79.

3. Montana, State Water Conservation Board, Summary of Activities From Inception January 22, 1934 to June 30, 1960, by Kelly (1961), p. 61.

4. Ibid.

5. Ibid., pp. 1-2.

6. Ibid., p. 3.

7. Ibid, p. 5.

8. Sheridan, "Water Water Everywhere --- But? A Study of the Politico - Administrative Aspects of Water Development in Montana" [Report No. 9, Montana University Joint Water Resources Research Center, 1968): 64.

9. Revised Codes of Montana Annotated 1947 and Cumulative Supplement, 1965, 69-4813, hereinafter referred to as R.C.M. 1947.

10. Montana, Fish and Game Department, Biennial Report, May 1, 1960 - April 30, 1962 (1962). [This work is entitled "Montana Wildlife"], p. 21.

11. Ibid.

12. Presently codified at MCA 87-5-501 through 87-5-509.

13. Paradise Rainbows vs. Fish and Game Commission 148. Mont. 412, 421, p.2D 717, 1966.

14. Ibid., p. 421, p2D at 721.

15. Montana, Fish and Game Commission, Senate Minutes, 40th Legislative Sess., 5 and 7 February, 1969.

16. Ibid., 5 February 1969.

17. Dewsnup, "Legal Protection of Instream Water Values" (Report to the National Water Commission, Arlington, Virginia, September 1981), p. 21.

18. Helena, Montana, interview with James Posewitz, Dept. of Fish, Wildlife and Parks Offices, (hereinafter referred to as DFWP), 21 March 1984; interview with Ted Doney at his law offices, 22 March 1984.

19. Helena, Montana, Water Law Advisory Council Meeting (hereinafter referred to as WLAC) Minutes, (1 May, 1982), p. 1.

20. Mont. Const. art. IX:

Section 3, WATER RIGHTS. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial use as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of localized records.

21. Helena, Montana, WLAC Meeting Minutes of 29 Sept., 1972. p.1.

22. Posewitz, interview, 21 March 1984; and Doney, interview, 22 March 1984.

23. Helena, Montana, WLAC Meeting, Minutes of Oct. 30, 1972).

24. Gary Wicks, Director, Department of Natural Resources and Conservation (hereinafter referred to as DNRC), letter to Senator Will Lowe, Helena, 5 January, 1973, WLAC file.

25. Montana Code Annotated, 85-1-101 (10) (1979).

26. James L. Huffman, The Allocation of Waters to Instream Flows: Montana Water Resources Management, Final Report to the Office of Water Research and Technology, U.S. Dept. of Interior, Vol. IV (July, 1980), p. 22.

27. Helena, Montana, interview with Gary Fritz, DNRC office, 20 March, 1984.

28. Mont. Const. art. IX, sec. 3.

29. Montana Code Annotated, 85-2-601-603 (1979).

30. Montana Code Annotated, 85-2-601 (1979).

31. Diversions of over 20 CFS or storage of over 14,000 AF. R.C.M. 1947, sec. 89-9-103, et. seq.

32. Montana, DNRC, Yellowstone River Basin Draft Environmental Impact Statement for Water Reservation Applications (2 vols.) (1976).

33. Montana, DNRC, Yellowstone River Basin Final EIS for Water Reservation Applications (1977).

34. Huffman, Allocation of Water to Instream Flows, p. VI-26.

35. Montana Laws, Chapt. 26 §§ 1 (1977).

36. ". . . if a court stays or enjoins the continuance of proceedings on any pending application for reservation of water . . . and such stay or injunction prevents the Board from making a final determination on such application before January 1, 1978," in which case the court could extend the moratorium by the length of the delay up to January 15, 1978. MCA 85-2-603(1)(c), 1979.

37. Montana, DNRC, Order of the Board of Natural Resources and Conservation Establishing Water Reservations (1979).

38. Ted J. Doney, et al., "Yellowstone Water Reservations: Decision-making by a Citizen Board," Utilizing Scientific Information in Environmental Quality Planning, (Minneapolis: American Water Resources Association, September, 1979), p. 105.

39. Montana Administrative Code 36-2.14R(1) - § 1400 (1979).

40. Doney, et al. discuss the Board's role in the reservation process in "Yellowstone Water Reservations".

41. Montana, DNRC, Order Establishing Water Reservations.

42. Montana Code Annotated 85-2-316(5) (1979).

43. Ibid., 85-2-316(10) (1979).

44. Ibid., 85-2-316(11) (1979).

45. Huffman, Allocation of Water to Instream Flows, pp. IV-24 and IV-152 - IV 153.

46. Wilson F. Clark, "The Yellowstone River Water Reservations - A Summary and Overview", unpublished paper (6 January 1979), p. 7.

47. Montana, DNRC, Order Establishing Water Reservations, p. 49 condition 117.

48. Ibid., p. 27 condition 81 and p. 29 condition 82.

49, Clark, "Yellowstone River Water Reservations", p. 7.

50. David H. Hickox, "River Basin Management in The Yellowstone River Basin, Montana," Symposium Proceedings - Unified River Basin Management (Minneapolis: American Water Resources Association, May 1980), p. 117.

51. Montana, Dept. of Fish, Wildlife and Parks, Fisheries Division, Annual Reports of 1979, 1980, 1981, 1982, 1983. [Works are entitled "The Yellowstone River Instream Reservation"].

52. Montana, DNRC, "Water Reservation Concerns Identified", discussion paper at the Board of Natural Resources meeting (6 November 1981).

53. Montana, DNRC, Order Establishing Water Reservations, p. 13 condition 46.

54. Ibid., p. 7 par. 22, p. 18 par. 56 and p. 24, par. 74.

55. Helena, Montana, Board of Natural Resources and Conservation Meeting, Minutes of 11 December 1981.

56. Montana, DNRC, "Water Reservations and Water Availability in the Yellowstone Basin", by Daniel Soboshinski and Diane Lozovoy. (May 1982).

57. Ibid., p. 6.

58. Helena, Montana, interview with Steve Schmitz, DNRC office, 3 May 1984.

CHAPTER 3

WYOMING'S CURRENT SITUATION CONCERNING WATER RESERVATIONS ON JOINT MONTANA - WYOMING WATERWAYS

The water reservations currently existing on the Yellowstone River allow Montana to plan for the future of the Basin. Another important factor which must not be forgotten when reviewing the water use situation in the Basin is the Yellowstone River Compact of 1950.

The Yellowstone River Compact, a federally ratified agreement among the states of Montana, Wyoming, and North Dakota, regulates the division and diversion of water from the four major tributaries of the Yellowstone between Wyoming and Montana.[59] These four major rivers -- the Clarks Fork of the Yellowstone, the Big Horn River, Tongue River, and Powder River -- flow north from Wyoming into Montana to join the Yellowstone River mainstream. Signed by the participating states in Billings, Montana on December 8, 1950, the Compact remains an enforceable guide to how the waters of these rivers can be utilized.

The stated purpose of the Compact is "to remove all causes of present and future controversy between said states . . . with respect to the waters of the Yellowstone River and its tributaries . . . to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof." The Compact provides that all appropriative rights to beneficial uses of the water of the Yellowstone River System existing in each state as of January 1, 1950

shall continue to be recognized as valid rights under the doctrine of appropriation. Further, the Compact provides that of the unused and unappropriated water of the interstate tributaries of the Yellowstone River as of January 1, 1950, each state is entitled to the water it needs to supplement irrigated lands if they were irrigated prior to January 1, 1950.[60] Table 2 indicates how the remaining water is allocated in the major interstate tributaries of the Yellowstone between Montana and Wyoming.

TABLE 2

Division of Waters Under the Yellowstone River Compact

Tributary	Wyoming	Montana
Clarks Fork, Yellowstone	60%	40%
Bighorn	80%	20%
Tongue	40%	60%
Powder	42%	58%

Another important aspect of the Compact is that nothing contained therein is to be so construed or interpreted as to adversely affect any rights to the use of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes and their reservations.[61]

With the Compact in place on the major drainages of southeastern Montana, it is important for Montana to monitor real or potential changes in Wyoming's water use patterns which might alter the amounts of water Montana receives under the Compact provisions. Recently, Wyoming has been considering water reservations for instream flows which could theoretically affect the flows Montana receives under the Yellowstone River Compact.

For several years now, the topic of recognizing instream flows as a beneficial use of water has been much discussed in Wyoming. Under current Wyoming law, instream flows are not listed as a beneficial use of water.[62] Since 1980, there has been a concentrated effort to have the reservation of these flows recognized as a valid use. In the 1982, 1983 and 1984 Wyoming legislative sessions, bills were introduced to establish mechanisms to protect instream values by providing for guaranteed instream flows.[63] Under the auspices of the various bills, instream flows could be achieved by purchasing currently stored water for later release, building new storage units on affected waterways, buying existing water rights for instream flow purposes or appropriating unappropriated waters for direct instream flows. During each legislative session, these bills were either voted down by the legislature as a whole or killed in the respective House or Senate committees.[64]

Since 1982, proponents of an instream flow law have been working toward a legislative initiative for the November, 1984 general election ballot. Despite coordination by the Wyoming Citizens Committee for Instream Flows, public interest groups have had difficulty meeting the requirements of the Wyoming initiative laws. On December 16, 1983, this citizens group turned in initiative petitions containing 27,587 signatures. The Secretary of State allowed approximately 300 more signatures to be added that had been postmarked before the December 16th deadline. On January 7, 1984, the Secretary of State stopped checking signatures on the instream flow initiative petitions and declared the filing unsuccessful. With over 83 percent of the petitions checked, enough signatures had been disqualified to fall short of the 25,810 needed to approve the petition.[66]

The legislative initiative process in Wyoming, however, is not as well defined as that of other states. The question of timing for signature collection was put forth by the Secretary of State herself in letters dated January 13 and January 24, 1984, to the Wyoming Attorney General.[67] The question of whether or not the initiative drive had ended because an insufficient number of signatures of qualified registered voters was received was prominent. The Attorney General's opinion of February 13, 1984 stated that the Secretary of State must essentially continue receiving initiative petitions for an apparently open-ended time period because there was no provision on the books regulating the lengths of initiative drives.[68] As stated by Attorney General McClintock, ". . . the language of the initiative and referendum statutes gives no indication of . . . intent to limit the duration of a petition drive. There simply is no time limitation placed on the petitioners."[69]

As a result, the instream flow initiative in Wyoming is still very much alive. The Wyoming Citizens Committee for Instream Flow estimates that an additional 1,800 signatures are required to place the measure on the 1986 general election ballot, and they are confident this goal will be met.[70]

One major point of consensus among the Wyoming water resource experts interviewed for this paper is that whether by initiative or direct legislation Wyoming will soon have statutes recognizing instream flows as a beneficial use of water.[71] Wyoming has had some limited experience in using storage to supplement flows, but except in one isolated incident, these flows were designed to supplement agricultural uses. If Wyoming does indeed change its laws concerning the use of

water for instream purposes, the question becomes how these changes might affect Montana's share of water in the tributaries of the Yellowstone River.

Under the provisions of the Yellowstone Compact it appears that regardless of how Wyoming manages water for instream flows in the Yellowstone Basin, Montana will be guaranteed at least the flows protected by the Compact. In theory at least, the institution of minimum instream flows upstream of the measuring gauges of the interstate tributaries of the Yellowstone River could actually result in increased water quantities for Montana's uses. This could be the case if Wyoming were to reserve instream flows for a stream segment directly south of Montana's border and curtail future uses elsewhere in the Basin to maintain these flows. Wyoming would, however, attempt to continue to fully develop its share of the Compact waters and protect any new instream flow if it were at all feasible.[72]

The initiation of the instream flow concept in Wyoming should have no effect on the division of the waters of the Yellowstone River tributaries. For Montana to benefit from a smaller future decrease in water quantity that could result from instream flow establishment by Wyoming, it would take a concentrated public attempt to establish such flows on the Wyoming portions of the tributaries closest to the state line. Such an instream flow regime would result in an increase in Montana's share of water only if the required flow was above what Wyoming must pass to Montana under the Compact. The possibility of such a public effort in the Yellowstone Basin is deemed by both state officials and public interest spokesmen to be nonexistent.[73]

Another question that arises concerning Wyoming's use of Yellowstone Basin water is the concept of *de facto* reservations. Without actually having reservation language in place in state law, Wyoming has managed to protect some quantity of water for future development. This concept can best be evaluated in terms of Wyoming's statutes concerning storage projects and new appropriation permits.[74]

Since Wyoming does not have a reservation law *per se*, it is necessary to review what mechanisms they do have which might allow them to reserve waters for future uses against Montana's claims. With storage of water being recognized as a valid beneficial use in Wyoming, Montana's neighbors have established their own system of claiming water for future uses. This means of reserving water is prevalent in Wyoming but apparently not important in the Yellowstone tributaries because of the protection afforded Montana by the Yellowstone Compact.[75] According to the provisions of the Compact, any water used in Wyoming from storage projects which was not used prior to 1950 must be accounted for in the percentage allocations set on each tributary for the participating states.[76]

The Wyoming water use permit system, on the other hand, has been of concern to Montana since the signing of the Yellowstone Compact. Due to the structure of Wyoming's laws and the historical administration of the system, the requirement of due diligence in the perfecting of a water permit has been liberally interpreted. Prior to the Yellowstone Compact, filings for new permits were made in the Yellowstone Basin, priority dates were assigned, and in some instances permits were granted. Due to the Compact provisions recognizing pre-1950

rights as valid and excluding water required for such rights from the division of flows between the states, at least two of these undeveloped water permits are still on the books in Wyoming. Totalling 42,675 acre-feet, these pre-1950 storage permits are a continuing source of controversy between Montana and Wyoming.

In a recent draft report prepared for the Wyoming Water Development Commission[77] concerning storage developments in the Powder River Basin, Wyoming again maintains that these unperfected pre-1950 permits cover projects which, when completed, would not utilize water from Wyoming's post-1950 allocated flow. Montana disagrees with this interpretation of the Compact conditions, and a January, 1984 letter from Governor Schwinden to Governor Herschler makes this point clear to Montana's southern neighbors. Calling Wyoming's claims to pre-1950 water in these projects "paper water rights," Montana argues that Article V(c) of the Compact clearly states that reservoirs developed after January 1, 1950 must use what is considered to be allocable water.[78] Wyoming continues to claim that these pre-1950 water use permits should not count against the flows that must be split between the states. The debate rages on.

The uncertainty of Wyoming's two undeveloped pre-1950 projects ever being constructed poses only a minor threat to Montana's water quantities in the Yellowstone Basin. Coordination among the Compact states in managing the Yellowstone tributaries has been and will remain good. Overall cooperation will remain essential, but the water supply situation should remain stable for some years to come.

FOOTNOTES FOR CHAPTER 3

59. Montana Code Annotated 85-2-1 - 85-20-121 (1981).

60. Bechtel Corporation, Tongue River Project: Water Allocation Study (Report to the Montana Water Resources Board, 1968), p. 3.

61. Yellowstone River Compact, Art. 5, Montana Code Annotated 85-20-1 - 84-20-121 (1981).

62. Wyoming Const. Ch. 3, art. 1, sec. 41-3-101 (1981).

63. Cheyenne, Wyoming, interview with Tom Dougherty, Director of the Wyoming Wildlife Federation, 26 March 1984.

64. Idem., Committee Chairman of the Wyoming Citizen's Committee for Instream Flows, 26 March 1984.

65. "The Pronghorn", Wyoming Wildlife Federation, January, 1984, Vol. 2 No. 2, p. 1.

66. Ibid.

67. Thea Thompson, Wyoming Secretary of State, letters to Attorney General McClintock.

68. Attorney General McClintock, opinion to Secretary of State T. Thompson, 13 February 1984.

69. Ibid., p. 2.

70. Dougherty, interview, 26 March 1984.

71. Cheyenne, Wyoming, interviews with Wyoming public officials Warren White, Governor's Natural Resources Aide; Larry Wolfe, Assistant Attorney General; George Christopolus, State Engineer; all on 26 March, 1984.

72. Christopolus, interview, 26 March 1984.

73. White, Wolfe, and Christopolus; interviews, 26 March 1984.

74. Wyo. Const. ch. 4, art. 5, sec. 41-4-501 - 41-4-517; Wyo. Const. ch. 14, sec. 41-14-101-103.

75. Christopolus, interview, 26 March 1984.

76. Yellowstone River Compact, Art. 5, Sect. 2, MCA 85-20-1 - 85-20-121 (1981).

77. Wyoming, State Engineer's Office, Level I Reconnaissance Study Draft (1983). [This work is entitled "Storage Developments for Water Supply: Powder River Basin in Wyoming"].

78. Ted Schwinden, Montana State Governor, to Ed J. Hershler, Wyoming State Governor, 3 January 1984, p. 3.

CHAPTER 4

OVERVIEW OF THE CURRENT SITUATION ON THE MISSOURI RIVER

The Water Reservation Question in the Missouri River Basin

The issue of establishing water reservations in the Missouri River Basin has been a topic of concern to Montanans since the adoption of the Yellowstone River reservations in 1978. Discussions concerning the procedure and mechanisms for implementing Missouri River reservations have occurred at all levels of government. The resultant debate has been both educational and frustrating to all involved. Due to the current water use situations ongoing in the Basin and the unanswered questions about water availability for future uses, essentially no action has been taken to reserve Missouri Basin water. The issues which will eventually influence Montana in its decision concerning water marketing are the same ones which will impact future reservation decisions for agricultural, municipal and instream uses.

During the early days of the 1983 legislative session, a bill was introduced by Senator George McCallum which would have addressed the concept of reservations in the Missouri Basin.[79] Drafted at the request of the Joint Subcommittee on Business, Senate Bill 51 was the Subcommitttee's response to their concern about the problem of future allocation of the waters of the Missouri River among Missouri Basin states.[80] The Joint Subcommittee on Business, in their earlier discussions con-

cerning the means at hand for quantifying Montana's future water needs from the Missouri, had decided that the reservation process would give the state a defined idea of actual future demands for the Basin.[81] The value of the existence of the reservation system had become an assumed fact; the question of the system's mechanisms and timing, the debatable factors.

Senate Bill 51 proposed that the state follow a process similar to that in the Yellowstone in establishing Missouri River reservations. The bill also set a time frame for submission of applications for reservations and a decision date on reservation quantities of July 1, 1987 for the Board of Natural Resources. Proponents of the bill argued that the immediacy of a downstream threat, graphically illustrated by South Dakota's recent sale of water to a pipeline company for out-of-Basin use, demanded an immediate move to reserve water in the Missouri Basin. For a variety of reasons, opponents strongly disagreed.

On both the question of timing and appropriate procedures, opponents converged. Testimony from the Montana Association of Conservation Districts, the Association of State Grazing Districts, the Montana Cowbelles and the Montana Stockgrowers attacked the time frame as unrealistic and questioned the applicability of the Yellowstone procedure in the Missouri Basin.[82] Comments by the Montana Farm Bureau and the Department of Natural Resources and Conservation revolved almost solely around the process being called for by the bill.[83] In detailed testimony submitted to the committee, Leo Berry, Director of the DNRC, pointed out the reservation's questionable effectiveness in an interstate water allocation and suggested that a move to immediately begin a

Basin-wide reservation process would be premature due to the many water use conflicts in the Basin.[84] Senate Bill 51 eventually failed in committee, but the points made during its discussion remain alive and will be heard again during the upcoming legislative session. The current status of water use in the Missouri Basin and the options which remain for Montana are important background facts, having great bearing on both the discussion of water marketing and future reservations by the Montana legislature.

The Missouri Basin above Great Falls

The drainage area of the Missouri River Basin includes just over 56 percent of Montana. What this means to the individual concerned with the utilization of the Missouri Basin's water is that 82,000 square miles of Montana land are directly affected by water allocation decisions on the Missouri and its tributaries.[85] The importance of the Missouri to Montana's future economic well-being cannot be overemphasized.

For purposes of discussion concerning the current situation in the Basin, the river system can best be viewed in two segments. Splitting the river at Great Falls allows a cohesive overview to develop due to the distinct difference in the use of water in the upper and lower segments. From the clear mountain brooks of the upper tributaries to the slow moving, sediment-laden waters of the tributaries in the lower basin, the issues, like the river itself, differ yet maintain their interrelated character.

The Missouri River above Great Falls is beset with water allocation problems brought on primarily by past water management activities un-

dertaken in the Basin. One of the most influential developments in this stretch of river is the 51 MW hydroelectric power plant installed at the Bureau of Reclamation's Canyon Ferry Dam. The hydropower demands of this dam, combined with those of seven other Montana Power Company hydroelectric facilities on the Missouri mainstream in the Basin, appear to be the largest factor in limiting future diversion uses above Great Falls.

Two important ongoing situations pertaining to these hydropower rights are the DNRC's "Canyon Ferry Order"[86] and the pending Supreme Court case known as *Montana Power vs. Monforton*.[87] In both of these instances, the question of water availability for future uses in the Missouri and its headwater tributaries is being contested. While each of these matters is being debated, the question of any future developments above Great Falls remains unsettled.

In the proposed "Canyon Ferry Order" issued by the DNRC in June, 1982, several important issues were addressed by the Department's Administrative Hearings Officer. Montana Power Company had objected to the issuance of a water use permit by DNRC to an applicant for a relatively small agricultural use.[88] The Bureau of Reclamation also objected, and both claimed that any future appropriation of Missouri River water above Canyon Ferry Reservoir would infringe on their claimed rights to water. While Montana Power uses its plants strictly for electrical production, the Bureau of Reclamation operates Canyon Ferry for a variety of uses, as mandated in the construction authorization for the Canyon Ferry Unit of the Missouri River Basin Project.[89] Both objections state that no unappropriated water exists above Canyon

Ferry Reservoir and that additional appropriations would deplete water needed for hydroelectric generation. The DNRC was required by statute to review the situation and render an administrative opinion.

The administrative review process determined that Canyon Ferry Reservoir was being operated to maintain as much carryover storage as possible. Relying primarily on direct flows of the Missouri for hydroelectric uses, some stored water is released for power production at various flows up to the 6,250 cubic feet per second (cfs) capacity of the turbines.[90] The issue of whether or not the dam operators wasted water through excessive storage became a central point in reviewing the plant operation. An examination of the current operation and a review of water availability in the upper Missouri River[91] indicated that if the extent of the Bureau of Reclamation water right is measured by spillage over the dam, there were virtually no years in which water would be available for upstream consumptive uses after August 9th. Further, it was found that if the customary method of operation was followed, there would be no water available for new upstream uses after early July. In fact, water for any upstream consumptive uses would only be available in six out of ten years under the present scenario.[92] To top it off, the Montana Power Company claimed that the current operation procedure at Canyon Ferry was essential to protect its even larger water right at Cochrane Dam for 10,000 cfs.

In the proposed order, the DNRC extensively examined the Canyon Ferry issue from every conceivable viewpoint. Keying in to the operation of the Canyon Ferry Unit, the order includes sections discussing the Bureau of Reclamation's role, the Montana Power Company's role,

navigation, flood control, fish and wildlife concerns, the federal role in selling surplus waters from the facility, the nature and extent of storage rights under Montana and federal law, and the federal use of waters for agricultural, municipal and hydroelectric uses. The Department determined that the Montana Power Company could "reasonably exercise its rights" under the changed conditions prompted by upstream development, and it was proposed that a permit be granted to the applicant.[93] Montana Power continues to disagree with the decision, and has filed its objections with the Department.

With the exhaustion of administrative remedies, the issue is almost certain to enter the judicial arena. The existence of the rights associated with the Canyon Ferry, Hauser, Holter, Cochrane, Ryan, Rainbow, Marony and Black Eagle hydroelectric facilities could eventually dictate closure of the Missouri Basin above Great Falls to any future uses. The courts will be forced to review the situation and determine what, if any, options future appropriations will have in the Basin. The status of hydropower rights for both federal and private developments must be substantiated. Decisions reached will have monumental impact on the Upper Basin.

In the Monforton case, a similar issue is being examined. Once again revolving around the issue of Upper Basin diversion of water for agricultural use, this case centers on the ability of the DNRC to apply conditions to water use permits to protect existing water rights.

On October 24, 1979, the Montfortons filed an application with the DNRC to appropriate water for agricultural use from Cold Springs, a tributary of the Boulder River. As required by law,[94] the DNRC pub-

lished a notice and informed existing water right holders of the application. On August 29, 1980, the Montana Power Company filed an objection to the application alleging insufficient unappropriated water in the Missouri River above their hydroelectric generation facilities to satisfy both its existing rights and the applicant's proposed diversions. Other water users in the area objected, claiming that issuance of the permit in question would also harm their existing water rights.[95]

In June of 1983, the DNRC held a hearing in Whitehall, at which testimony was heard on behalf of the objectors. On March 1, 1982, after considering the testimony, exhibits, briefs and written comments, the DNRC approved the application. The permit as issued was conditioned by the DNRC with quantities less than those requested, an abbreviated period of diversion and express limits for all diversions when Montana Power's Cochrane Dam was spilling water. One month later, on April 1, 1982, the Monfortons, as applicants, filed a petition for judicial review of the DNRC's order with the Fifth Judicial Court at Jefferson County. In their appeal, they objected to the three conditions specified above.[96]

Less than two weeks later, the Montana Power Company filed an appeal in the First Judicial District at Lewis and Clark County. Montana Power objected to issuance of the permit, claiming that DNRC had essentially ignored the evidence concerning the magnitude of Montana Power's existing hydropower rights. Montana Power also claimed that the DNRC order contained no provisions for enforcement as mandated by both the Constitution and the statutes.[97]

After consolidation of the two petitions, the case was heard by Judge W.W. Lessley, Chief Water Judge, on April 21, 1983. Judge Lessley held that the DNRC had violated statutory provisions in the Water Use Act by limiting the period of use and amount of water requested, and concluded that:

> Until the other appropriator's rights have been adjudicated, the terms allowed by 85-2-312 [MCA (1981)] are limited. The DNRC may only require the permittee to affirmatively determine that his appropriation is complying with the historical rules and laws of prior application.[98]

Judge Lessley's decision has been appealed to the Supreme Court by the Montana Power Company, the DNRC and local irrigators affected by the issuance of the permit.

Oral arguments were heard by the Supreme Court in early March, 1984. A final decision is expected by early summer.[99] The impact of the case may indeed be far-reaching. The structure, content and effectiveness of Montana's water use permitting system is being evaluated and questioned. If the Supreme Court upholds the Water Court's findings, the Upper Basin water users may interpret it as an opportunity to file for water use permits that could not be conditioned by the DNRC. Although the decision does not make the water scarcity problem evaporate, it may make it appear so to new users who would receive permits with no limiting conditions. Support for the decision may also lead to rapid legislative attempts to change the existing water use statutes. Overturning the lower court's decision may or may not reinforce claims to large hydropower rights in the Missouri. Whatever the results, the decision demands attention as an indication of the Court's thinking on future water use in the Upper Missouri Basin.

An additional water use issue in the Upper Basin is the question of establishment of instream flows for fish, wildlife and health reasons. The Missouri River drainage above Great Falls contains some of the best wild trout waters in the nation. Through "Murphy filings", instream flows have been legally designated for reaches of a few tributaries, but much of the Upper Basin remains unprotected by anything but the Montana Power Company's claims for hydropower rights downstream.

In 1979, the Department of Fish, Wildlife and Parks (DFWP) began collecting biological, hydraulic, streamflow and recreational data for specific portions of the drainage in order to quantify and support instream flow requests.[100] With the Yellowstone Reservations in place, it was felt by instream flow advocates that the Missouri River Basin would soon be evaluated in a similar manner. Much work has gone into this process by DFWP, the Bureau of Land Management and the U.S. Forest Service. At this time, data has been assembled that would support instream flow requests not only on the main river segments but also in the majority of the Basin's tributaries which are significant for biological reasons.[101]

It is also interesting to note that DFWP has filed claims under the statewide adjudication system for instream flows on the Beaverhead, Gallatin, West Gallatin and Smith rivers.[102] These claims are well documented and may force the water courts to deal with the question of instream flows prior prior even to the 1969 "Murphy's Rights." The fate of these claims will not be known until the adjudication is completed.

The importance of the Upper Basin tributaries in terms of economic benefits from tourism cannot be ignored in charting the future of the

Basin. Protection of the resource is to the economic advantage of the state and the heritage of the nation. Instream flow considerations, therefore, are also important to remember when discussing water use issues in the Upper Basin.

The Missouri Basin below Great Falls

The Missouri River below Great Falls is beset with its own problems, many of which are interconnected with, yet separable from, the situation in the Upper Basin. The issues in the Lower Basin tend to revolve around the concept of reserved water rights in that much of the water flowing through the Basin is open to both Indian and federal claims for varied purposes. Although on the surface water appears plentiful for future development, a closer examination reveals the real water availability uncertainty that exists in the Basin.

Perhaps the biggest unknown in the Lower Missouri concerns the four Indian reservations located within the Basin. Before the water resources of the Missouri can be effectively developed and managed by the state, it is essential that they be quantitively determined. Due to the existence of Indian Reserved Rights in the Basin, there remains great uncertainty about actual water availability for future uses. Montana's 1973 Water Use Act included in its provisions the adjudication of all existing water rights, including both federal and Indian rights. In a series of court cases decided between 1975 and 1983, the question of who has jurisdiction in the matter of deciding Indian Reserved Rights was determined.[103] The July 1, 1983 holdings of the Supreme Court in *San Carlos Apache Tribe v. Arizona* again support the fact that states

have jurisdiction over the quantification of Indian water rights where a general stream adjudication is in progress.[104] With Montana involved in this type of general adjudication proceeding, any compacts resultant from ongoing negotiations with the Indian tribes of the Basin should pass the important jurisdictional test involving quantification of Indian rights.

Indian water rights are basically governed by a set of principles arising from the well-known 1908 United States Supreme Court case *Winters v. United States*.[105] The case itself grew out of non-Indian diversions of water for irrigation from the Milk River in Montana upstream of the Fort Belknap Indian Reservation. This diversion of the Milk interfered with the flow of water required by an Indian irrigation project on the reservation. The non-Indians involved had established their rights under state laws dealing with water appropriations. They argued that since the Indians had taken no steps to record their rights in the same way, the senior non-Indian right must be honored.

In deciding the case, the Supreme Court examined not only the water uses but also the congressionally ratified treaty of May 1, 1888, that established the Fort Belknap Reservation. The Court concluded that the purpose of the agreement creating the reservation was to encourage the Indians to abandon their nomadic ways and adopt agriculture as a "pastoral and civilized people."[106] The Court further stated that although nothing was said about water rights in the treaty, the obvious purpose was to promote agriculture among the Indians. Since irrigation was necessary for agricultural activities on the reservation, the Court maintained that water for tribal use had been reserved by

implication when the boundaries were established in 1888. Further, these waters were exempt from appropriation under state law and these rights were superior to those acquired by the non-Indians. Lastly, the Court held that the Indian-reserved rights, in contrast to state-created rights, continue in effect even though not put to beneficial use and they could expand to fit the purposes of the reservations.

Later cases of the federal courts extended the Winters Doctrine to cover all reservations created by either executive order or treaty. In a 1963 Supreme Court case, *Arizona v. California*, it was stated that the principle of reserved rights extended beyond Indian lands to all federal reservations.[107] The existence of the Blackfeet, Rocky Boy, Fort Belknap and Fort Peck reservations within the Basin, as well as a Basin-wide distribution of federal lands totalling approximately 12,426,000 acres,[108] therefore constitutes a cloud on water availability for future uses.

Since 1979, Montana has been attempting to negotiate a solution to the quantification of these nebulous rights. With the passage of Senate Bill 76 by the Forty-Sixth Legislature,[109] a Commission was created to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes and federal agencies claiming reserved waters within the state. Officially titled the Montana Reserved Water Rights Compact Commission (the Commission), the group has nine permanent members: four appointed by the Governor, two by the Senate, two by the House of Representatives and one by the Attorney General. The Commission follows procedures provided by the enabling legislation[110] which outline the

steps to conduct negotiations, integrate negotiated reserved water rights into the adjudication proceeding, terminate negotiations and resolve claims should a compact not be negotiated by July 1, 1985. The legislation, however, does not provide any criteria upon which compacts must be based.

Presently, the Compact Commission is conducting negotiations with three of the four reservations in the Missouri Basin: the Sioux and Assiniboine tribes of the Fort Peck Reservation, the Assiniboine and Gros Ventre tribes of the Fort Belknap Reservation and the Rocky Boy's Chippewa-Cree Tribe. Negotiations are also proceeding with the federal government on the various public lands in the drainage. In entering the negotiating process, both the federal government and the Basin tribes have made it clear that they are not accepting state jurisdiction over their water rights but simply opening talks aimed at possible negotiated settlements.

Of the four reservations in the Basin, only the Blackfeet have failed to enter negotiations, and it appears unlikely that this situation will change.[111] Unlike the other negotiating groups in the Basin, the Blackfeet Tribe apparently feels that a negotiated settlement of its rights in a state forum could not fail to be detrimental to them in altering the current unknown quality of their rights.

An additional party to the ongoing negotiations in the Missouri Basin is the Turtle Mountain Chippewa Tribe of North Dakota. This tribe has 60,000 acres of Montana land allotments granted to its members, mostly in the northeastern corner of the state. Although this tribe is not located on one of the seven reservations in Montana, the

Commission is empowered to negotiate these water rights, since the tribe is claiming reserved water rights within Montana. The results of these negotiations, however, will involve minor quantities of water compared to the more major claims of Montana's tribes.

The Commission has yet to conclude a compact with any of the participating tribes. Talks have progressed furthest with the Fort Peck tribes and tentative agreements had been reached on most of the major issues. A proposed Compact has even been drafted in the Fort Peck negotiations, but final approval remains distant.

The importance of any negotiated settlement of reserved rights in the Basin becomes evident when one examines the question of water availability and its present unknown status. Incorporation with ongoing adjudication will help quantify and identify a substantial portion of existing rights. The establishment of reserved water right allocations within the Basin might represent quantities which can be reasonably and practically put to use by the reservants in the future. Negotiated settlements may represent no more than what the state, the tribes and the federal government can agree to at this point in time. Future situations may even dictate that Indian-reserved water could be used for purposes and lands off the reservation for some periods of time. The existing uncertainty of these reserved rights cannot be ignored in planning the future utilization of the water resources in the Basin.

Another major reserved right that may be present in the Missouri Basin is associated with the 149-mile stretch of river from Fort Benton to the Fred Robinson Bridge. This segment has been officially designated the Upper Missouri National Wild and Scenic River, and is admin-

istered under the provisions of the National Wild and Scenic Rivers Act.[112]

The National Wild and Scenic Rivers Act was enacted on October 2, 1968, and in it Congress stated:

> "It is hereby declared to be the policy of the United States that certain selected rivers of the nation, which with their immediate environments, possess outstanding remarkable scenic, recreational, geological, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes."[113]

On October 12, 1976, this Act was amended to incorporate this segment of the Missouri River.

This stretch of the Missouri had been considered unique for years. As early as 1960, state and federal agencies began actively attempting to maintain its status by protecting it from new mainstream reservoir proposals. In 1962, the stretch was recommended for inclusion in the National Park System as a 268,000-acre Lewis and Clark National Wilderness Waterway.[114] In 1966, the State of Montana gave official recognition to the recreational values of this segment of the Missouri by designating it a component of the Montana Recreational Waterway System.[115] In 1968, a publication of the Department of the Interior's Bureau of Outdoor Recreation recommended protection of this free-flowing segment of river as the Missouri Breaks National River.[116]

After passage of the Wild and Scenic River Act in 1968, action to preserve the river in its present state stepped up. A team consisting of representatives from the State of Montana, Bureau of Land Management, U.S. Fish and Wildlife Service, Army Corps of Engineers, Bureau of Reclamation, National Park Service, U.S. Forest Service, and the Bureau of Outdoor Recreation conducted an interagency study on the issue of including the Upper Missouri in the Wild and Scenic system. Public hearings were held in local communities in November, 1972, to gauge local sentiment. Compromises were reached and recommendations made in January of 1975.[117]

After failed attempts in March of 1971 and February of 1973 at Congressional inclusion of the Missouri in the Federal Wild and Scenic System and after state attempts at protecting the Missouri River in a state wild and scenic river system failed in 1974, Montana Senator Metcalf introduced S-1506 in the U.S. Senate during May of 1975. In September of 1976, House Resolution 15482 (a somewhat modified S-1506) was approved by the House and on October 12, 1976, President Ford signed the law adding the Upper Missouri to the protected rivers system.

The Upper Missouri National Wild and Scenic River is administered under the provisions of the National Wild and Scenic River Act by the Bureau of Land Management. This segment of river, due to language included in the provisions of the law placing it under federal protection, is also administered under the provisions of multiple use and sustained yield found in the Taylor Grazing Act.[118] What this means in terms of development of the water resources in this stretch is that

while no dams may be built and commercial development is restricted, private landowners can continue existing agricultural practices. In addition, new pumping facilities and associated pipelines can be constructed "to assure the continuation of an adequate supply of water from the Missouri River to owners of land adjacent to the river for future agricultural use outside the river corridor."[119]

As the agency responsible for administering and managing the river and related resources in the Wild and Scenic stretch, the Bureau of Land Management has developed a complete management plan for handling the area's resources. In cooperation with the Montana Department of Fish, Wildlife and Parks, the Bureau of Land Management has recently developed instream flow quantifications designed to maintain the flows necessary to provide adequate habitat for the existing aquatic community in this stretch of river. Studies were also conducted to determine recreational flow requirements, mainly for floaters, in this reach of river. In 1983, a draft summary of these instream flow requirements was presented to the Department of Natural Resources and Conservation for review.[120]

The impact of instream flow rights for the Wild and Scenic stretch of the Missouri on potential future development in the Basin is another question left unanswered, due to the interrelation of issues in the Basin. From the draft summary of instream flows submitted by the Bureau of Land Management, it appears that the availability of water for future uses, particularly irrigation, will be adversely affected in the Basin above the Fred Robinson Bridge. The magnitude and severity of the impact on future development would depend on how much land could

be irrigated, the crop requirements on possible new irrigated land, and the demand for increased agricultural production.[121]

In April, 1984, the Montana Reserved Water Rights Compact Commission was notified that the Bureau of Land Management would enter negotiations on the amount of water reserved for instream purposes in the Wild and Scenic reach of the Missouri River. This reserved right, then, will also be decided, along with the other federal and Indian reserved rights through negotiations. Junior in time to the former reserved rights and the large hydropower rights upstream, this instream flow determination may in effect lead to the closure of the Missouri River System to future development anywhere above the Fort Peck Reservoir.

Fort Peck Reservoir and the 1944 Flood Control Act

The existence of the Fort Peck Dam and Reservoir on the Missouri mainstem is perhaps the most important fact about the river pertinent to the ongoing debate concerning water marketing. Constructed during the 1930's, Fort Peck Reservoir was originally authorized by the Rivers and Harbors Act of 1935, with authorization for hydropower added by the Fort Peck Power Act of 1938. Built primarily by hydraulic earth fill methods, Fort Peck Dam remains one of the largest earth-filled dams in the world.

The reservoir behind Fort Peck Dam collects runoff from 57,725 square miles of land and stores a maximum of 19,140,000 acre-feet of water. The reservoir as currently operated provides flood and silt control, power generation, river flow stabilization, fish and wildlife

benefits, municipal water supplies, and minor amounts of irrigation water.[122] As one of the six major reservoirs on the Missouri mainstem, Fort Peck is considered instrumental to the realization of the goals outlined in what is known as the Missouri River "Pick-Sloan Plan."

The Flood Control Act of 1944 approved a plan of development for the Missouri River Basin that included the coordination and utilization of large federal projects at Fort Peck in Montana; Garrison Dam and Lake Sakakewea in North Dakota; Oahe Dam in South Dakota and Lake Oahe in North and South Dakota; and downstream of Oahe Dam, Fort Randall Dam and Gavins Point Dam. This Act was based upon a consolidation of the plans presented by the Corps of Engineers and the Bureau of Reclamation for future development of the Missouri River Basin.[123] Beyond the authorization of the six major projects, the 1944 Flood Control Act, which is the basis for the Pick-Sloan Plan, called for more than 100 potential reservoirs, several hundred irrigation units, pumping projects and canal systems, and more than 500 miles of levees.

The management of the Missouri River under the auspices of the Pick-Sloan Plan by the federal government is a major concern of Montana's policy makers. The regulation of flows in the Missouri for hydropower and downstream navigation can be detrimental to Montana in any future plan for development of the Basin's water resources for consumptive uses. The question of upstream rights to development is currently being debated and examined closely by all of the states affected by the plan. Perhaps the most important component of the 1944 Flood Control Act, in terms of setting priorities for use in the Basin, is the O'Mahoney-Millikin Amendment[124] which, in essence, appears to subor-

dinate navigation to other project purposes. This amendment provides a basis for reservoir operation to the U.S. Army Corps of Engineers and states in part:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of water arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."[125]

The interpretation of this amendment in any lawsuit to determine an equitable apportionment of the Missouri River or in any negotiations for a compact to settle the rights of the Missouri Basin states will be critical to Montana's future plans in the Basin. If it is found that navigational rights in the lower Missouri states are superior in quantities to what leaves Montana, future water development in the Missouri may indeed come to a screeching halt.[126]

For the present, it is important to note that the Pick-Sloan Plan authorized the Bureau of Reclamation to market unallocated water from Fort Peck Reservoir for consumptive uses. Water rights for Fort Peck Reservoir have not yet been quantified by the Montana water rights adjudication program, but claims have been filed for rights by both the Army Corps of Engineers and the Bureau of Reclamation. These claims for Fort Peck cover water for navigation, irrigation, fish and wildlife, municipal and various other uses.[127] Among these claims, water is reserved for marketing from the Bureau of Reclamation by the Department of Natural Resources and Conservation.

In February, 1975, a memorandum of understanding between the

Department of the Interior and the U.S. Army was signed to expedite the use of water for energy development in the Missouri River Basin. The terms of the agreement applied only to the six major mainstem reservoirs and allowed the Bureau of Reclamation to contract for the marketing of water for industrial uses and incidental purposes related to industrial development in the Basin. The memorandum also stated that because any water marketing would reduce the quantity of hydropower generated, no contract could be executed unless it was determined by both the Corps of Engineers and the Bureau of Reclamation that the new use should take precedence over hydropower.[128]

In September of 1976, the DNRC signed a contract with the Bureau of Reclamation to market water from Fort Peck Reservoir. Originally entered into for five years, the contract was amended and extended for five years on September 30, 1981.[129] Under the provisions of this agreement, the DNRC is empowered to enter into subcontracts by which water service may be provided to industrial entities that plan to divert water from Fort Peck Reservoir for beneficial use in Montana for coal development, steam electric generation, coal gasification, coal slurry pipeline transport, fertilizer plants, methanol-methyl fuel, diesel fuel and other related and incidental uses. The contract requires the federal government to allow the state first rights to enter into industrial water marketing contracts, but reserves the federal rights to market water from Fort Peck should the state not enter into an agreement with a potential purchaser.

The amount of water covered by the agreement totals 300,000 acre-feet. Cost of the water is adjusted after each five years, and current-

ly is set at $30 per acre-foot. This rate is up from the $20 fee included in the 1976 contract. The contract includes language in which each subcontract for industrial water will be required to follow an approval process set by the Bureau of Reclamation and the state will issue water contracts for the approved use. Standard subcontract provisions are agreed upon, and applicable state and federal laws are to be complied with in any resultant sale of Fort Peck waters.

No water has been marketed by the state under the terms of the DNRC - Bureau of Reclamation contract, but over the years there has been some interest expressed by industrial users. Before any water can be marketed, an Environmental Impact Statement will be required either as a component of the issuance of necessary state permits or as a required prerequisite to the signing of a subcontract between the state and the industrial user.[130] Any potential sale from Fort Peck will undoubtedly be subject to intense scrutiny by both the federal government and the State of Montana.

The existence of a water marketing contract on Fort Peck Reservoir is critical to the issue of water marketing in Montana's Missouri Basin. The availability of the 300,000 acre-feet for industrial use is caused by a surplus of Bureau of Reclamation-administered irrigation water that will not be put to use until after the year 2001.[131] When this water is utilized for future agricultural uses in the lower Missouri Basin, industrial marketing from Fort Peck will necessarily cease. If the contemplated development of this agricultural water does not come to fruition, however, the water may remain accessible for industrial use well into the Twenty-First century.

FOOTNOTES FOR CHAPTER 4

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80. Testimony of Senator McCallum to the Agricultural Committee, Exhibit #1, SB 59, Montana 48th Legislature, 12 January 1983.

81. Ibid.

82. Montana, Agriculture, Livestock and Irrigation Commission, Senate Minutes, 48th Legislative Session, 12 January 1983, p. 1.

83. Ibid.

84. Testimony of DNRC to the Agricultural Committee, Exhibit #2, SB 51, Montana 48th Legislature, 12 January 1983.

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86. Montana, DNRC, Final Administrative Order, "In the Matter of the Application for Beneficial Water Use Permit No. 12016-541G By Dan L. Brown," April 1984.

87. The Montana Power Company, Susanne Huckabon, Jessie Felshium and the DNRC - Appellants v. Remi and Betty Jo Monforton - Respondents, Mont. Sup. Ct. #83-323 (1983).

88. Montana, DNRC, Final Order, "Application for Water Use Permit By Don L. Brown", p. 10, Findings of Fact #3.

89. Flood Control Act of 1944, Pub. L. 534, U.S. Senate Documents 191 and 247.

90. Montana, DNRC, Final Order, "Application for Water Use Permit By Don L. Brown", Findings of Fact.

91. Montana, DNRC, Analysis of Water Availability on the Missouri River above Canyon Ferry Reservoir, by Diana Fitz (1981).

92. Montana, DNRC, Final Order, "Application for Water Use Permit By Don L. Brown", p. 14, Findings of Fact #29.

93. Ibid., p. 76.

94. Montana Code Annotated 85-2-307 (1981).

95. Montana Power Company, et al. v. Monforton - Appeal Brief Statement of Facts, pp. 1 - 9.

96. Ibid.

97. Ibid.

98. The Montana Power Company v. Carey, No. 47945 mem. op. at 4. Mont. 1st Dist. Ct. (1983).

99. Helena, Montana, interview with Bob Lane, DNRC offices, 3 April 1984.

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101. Helena, Montana, interview with Larry Peterman, DFWP offices, 4 April, 1984.

102. Ibid.

103. For a complete discussion see "Conflict Management: Negotiating Indian Water Rights" by Claudia Marseille, Western Natural Resources Policy Series #102 (Lincoln Institute of Land Policy, 1983).

104. 51 U.S.L.W. 5095 (1983).

105. 207 U.S. 564 (1908).

106. Marseille, "Negotiating Indian Water Rights", p. 11.

107. Arizona v. California, 373 U.S. 546 (1963).

108. Missouri River Basin Commission, Upper Missouri River Basin Level B Study Report and Environmental Impact Statement (1981), p. 39 Table 7.

109. Montana Code Annotated, Sections 85-2-201 and 85-2-243.

110. Montana Code Annotated, Sections 85-2-702, 703 and 704.

111. Helena, Montana, interview with Pete Stanley, DNRC offices, 10 April, 1984.

112. National Wild and Scenic Rivers Act, PL 90-542 (1968).

113. Ibid.

114. U.S., Dept. of Interior, Bureau of Land Management, Upper Missouri Wild and Scenic River Management Plan - Final (1978), p. 4.

115. Ibid.

116. Ibid., p. 5.

117. U.S., Dept. of Interior, Bureau of Reclamation, The Missouri River; A Wild and Scenic River Study (1975).

118. 48 Stat. 1269 as amended, Federal Land Management Policy Act, PL 94-579; 90 Stat. 2743 (1976).

119. Amendment to the Wild and Scenic Rivers Act, PL 94-486 Sec. 203(3) (1976).

120. Montana, DNRC, "Working Paper: Upper Missouri Wild and Scenic River Water Availability", by Darley W. Fuerst and Daniel A. Saboshinski (1984).

121. Ibid., pp. 16-17.

122. Montana, State Water Resources Board, Preliminary Survey Report, North Central Water Conservancy District (1970), p. VII-1.

123. U.S., Congress, House Document 475, 78th Cong., 2d Sess. 1944.
U.S., Congress, House Document 191, 78th Cong., 2d Sess. 1944.
U.S., Congress, House Document 247, 78th Cong., 2d Sess. 1944.

124. U.S., Congress, Senate Document 247, Sec.1(b), 78th Cong. 2d Sess., 1944.

125. Ibid.

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128. Memorandum of Understanding Between the Secretary and the Secretary of the Army, February 1970, Bureau of Land Management files, Billings, Montana.

129. U.S., Dept. of Interior, Bureau of Reclamation, Contract No. 14-06-600-2040A (1976).

130. Memorandum to the Files from Gerhard M. Knudsen, Regarding Notes on Questions to the Marketing of the Industrial Water From Fort Peck Reservoir, Montana, 18 January 1982, DNRC files, Helena, Montana.

131. Memorandum from the Solicitor to the Secretary of the Interior, Regarding Interior Authority to Market Industrial Water, 27 November 1974, Bureau of Reclamation files, Billings, Montana.

CHAPTER 5

THE LEGAL STATUS OF RESERVED WATERS IN MONTANA

The primary objective of the reservation process in Montana is the establishment of water rights to meet the needs and interests of the public, as represented by the various public agencies. Under the 1973 Water Use Act provisions, the Board of Natural Resources and Conservation can approve the reservation of water for beneficial use in the future while assigning a present-day priority date to the reserved water. One seldom-discussed item of concern about these reservations is the actual legality of the reservations in light of existing western water law.

The reservation of water for future uses as conducted in Montana is a useful method of quantifying and documenting potential uses as well as substantiating the viability of those potential uses.[130] However, in a situation which calls for the equitable apportionment of a basin such as the Missouri, these reserved waters may not be protected as well as Montanans would like. Because of the nature of the reserved waters in Montana, it is conceivable that the courts could ignore or invalidate the reservations we view as valid.

In any interstate allocation of the Missouri, it has been claimed that the most likely scenario would involve limiting depletions for all basin states.[131] In such a case, each state would have to keep their

diversion below a level set and agreed upon by all basin states. In determining this level of depletion, existing uses and future claims would be examined and challenged. The validity of Montana's reservations in this interstate arena appears questionable, due in part to the structure of the system itself.

What appears to be missing in our reservation system is the proper recognition required to make a water use a water right. Under the provisions of the reservation statute, reserved waters when put to beneficial use maintain the status of reservations and as such are open to review and modification by the Board. The amount of protection the present system affords Montana's future uses is an untested question to be determined by the courts. This situation, which in itself should not adversely affect water allocation decisions in an intrastate setting, makes it clear to other states that Montana's reservations may not be capable of rising to the level of a legally recognized completed appropriation.

Case law pertaining to the question of the validity of Montana's reservation system as a means to legally protect water resources is scanty at best. Protection of a planned future water use has been examined in several instances by the courts and to some extent has been upheld. In a 1910 Utah case, the Utah Supreme Court held that an application for a permit to put water to use was indeed the basis for "an inceptive right subject to contingencies", but went on to say that recognition of such a right was not enough in itself to constitute a valid appropriation.[132] In a Nebraska Supreme Court case, it was found that an applicant who held a permit to appropriate water actually had a

"contingent appropriation to the extent of his grant which gives him the prior rights to the use of this water against all subsequent claimants." The Nebraska court also stated:

> "'Appropriation', as applied to water rights, is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured."[133]

Other cases have been heard which revolve around the ability of a holder of a water use permit to halt actual appropriation of water that would detrimentally affect the planned, undeveloped use. In *Basinger v. Taylor*, the Idaho Supreme Court stated that the holder of an undeveloped permit had "nothing but an inchoate right" until water was actually put to beneficial use.[134] Similarly in *Yuba River Power Company v. Nevada Irrigation District*, the California court found that an undeveloped permit was a "constructive right," and an "incomplete right," implying that such a right did constitute an interest in real property.[135]

The cases listed above seem to indicate that a permit not yet perfected, while not constituting a vested property right, does have some value to the holder. However, the water reserved and utilized under Montana's water reservation system does not appear to be capable of achieving the status of a perfected permit. The inability to issue permits for the development of reserved waters, or to elevate reserved water to the status of water rights upon the utilization of the water, appears to leave the reservations open to legal attack.

Another unresolved issue that may affect the viability of the reservation system is whether or not any private rights are violated by a system which removes from availability waters which were previously open for appropriation by private entities. A similar issue was raised in *Wyoming Hereford Ranch v. Hammond Packing Company*. It was determined by the Wyoming Supreme Court that the establishment of such control by the state was not a serious infringement on individual rights.[136]

It has been conceded that the establishment of water reservations for future uses is an important step in establishing a framework for the right to use undeveloped Montana water. By assigning a present-day priority to these future uses, the system operates in much the same manner as would an application for a permit to appropriate water in preserving the priority date until the project is completed. But it is unrealistic to believe that in an interstate setting, the priority of a 1978 or 1988 reservation will stand against a later dated water right that has actually been constructed and developed. One positive note is that the built-in mandatory review process in our reservation system might be sufficient to establish the record of due diligence that goes into the development of the water resource. As time goes on and the reservations are honed, Montana's use of a reservation system may become very important when allocations are made based on state water plans for future use. The question of legality hinted at here can only be solved in the courts. Until it is, policy makers should remain aware of the potential controversy and seek solutions to problems even prior to their development.

FOOTNOTES FOR CHAPTER 5

132. Montana, DNRC, Water Resources Division, p. VI-15.

133. Ibid., p. VI-11.

134. Sowards v. Meagher, 108 P. 112, Utah (1910).

135. In re Commonwealth Power Company, 143 N.W.937, Nebraska (1913).

136. Basinger v. Taylor, 164 P. 522, Idaho (1917).

137. Yuba River Power Company v. Nevada Irrigation District, 279 P. 128, California (1929).

138. Wyoming Hereford Ranch v. Hammond Packing Company, 14, 236 P. 764, Wyoming (1925).

CHAPTER 6

PROTECTION OF MISSOURI BASIN FLOWS FOR MONTANA'S FUTURE USE

The question of how best to protect the water of the Missouri Basin for future use in Montana has been an ongoing discussion point for many years now. In anticipation of the 1983 legislative session, this question was examined in depth and reported on in the Department of Natural Resources and Conservation Study commonly referred to as the "Use It or Lose It" report.[139] Perhaps the component of the recommended strategy which has attracted the strongest interest is that which calls for establishing a claim to water for future in-state needs.

The issue of which claim process is most desirable in an interstate water allocation proceeding was brought before the legislature in the discussion of Senate Bill 51 during the 1983 legislative session. The existing reservation system could now be modified so as to strengthen the resultant claims to water for Montana's future needs. To accomplish this, several unanswered questions must be addressed, and a protection mechanism must be developed which assures Montana that its claims for future water use will be recognized in an interstate setting.

The quagmire of water use issues in the Missouri Basin of Montana adds to the uncertainty of the state's ability to protect water for future needs. The clarification of the issues previously discussed is essential if Montana wishes to work with realistic numbers concerning actual wa-

ter available in the Basin. The ongoing statewide adjudication of existing rights in Montana will also be important to the water availability question. Any system designed to protect future developmental or instream flows becomes a ludicrous exercise if the protected water does not even exist. If it is decided that water is not available to satisfy the estimated future demands in certain sections of the Basin, alternatives not previously examined must be evaluated, such as offstream storage projects or the potential of groundwater resource development.

In the establishment of the Yellowstone River reservations, one of the initial steps was to determine anticipated future water demands. The identification of quantities required in the future for our municipal, rural domestic, instream, agricultural, and industrial users must be accomplished prior to any valid Montana claim being recognized by other basin states for the Missouri Basin.

To properly identify potentially irrigable lands, time must be allowed to assess the basin's soil characteristics, topography, climate and land ownership patterns. Presently irrigated land in the basin must be examined, and the need for supplemental irrigation water considered. Development costs for each tract of land must be determined and benefits projected. Quantities of water necessary for these potential projects must be accurately determined.

For domestic water developments, a determination of population growth and its associated water needs must be made. The need for adequate supplies of high quality water year-round will also dictate research on the question of surface vs. groundwater sources. An appropriate per capita consumption rate must be arrived at and agreed to among the various users in the Basin.

The volumes of water required to sustain water quality and aquatic and associated habitat in the various portions of the Basin must also be calculated. Although portions of this work have been completed by the agencies involved, final determinations of appropriate flows will require continuing research and documentation.

One of the biggest obstacles to the establishment of the Yellowstone Basin reservations was the lack of complete and concise information available to the Board. When responding to a questionnaire that, in part, dealt with the role of technical information needed to arrive at water reservations, the majority of the Board stated that the available information on hydrology, municipal requirements, and industrial requirements was insufficiently clear. Three of the seven Board members felt there wasn't enough information on agricultural requirements. On no reservation request did all of the members believe the information to be sufficiently clear in its presentation.[140] Even more troublesome to the individuals charged with establishing the reservations than insufficient data was the lack of organization of the available data. A key lesson learned from the Yellowstone proceedings is that before the process begins, all the proper research and evaluations should not only be completed, but should also be concisely documented.

Once the proper numbers have been gathered and the issues in the Missouri Basin hammered out as much as possible, the state must choose the best method available to protect the future uses in the Basin. The current reservation system, with some modification, may be the best means available to protect these future uses. The use of the process on a Basin-wide scale would certainly provide the state with a

comprehensive, unified Basin management plan that would take into account both current and future depletions. However, as the system exists today, there remain legal questions about the reliability of the process for protecting these future uses against downstream threats.

The establishment of water reservations in the Yellowstone River Basin was actually a unique case in that the Board of Natural Resources and Conservation did not have to deal with massive non-consumptive mainstem hydropower rights in allocating future flows. What precipitated the Yellowstone reservation process was not only the current situation in the Basin, but also a recognition of the need to protect the future of such highly valued uses as agriculture and instream flows for fish, wildlife, recreation and water quality. While the present water reservation process does provide the state with a mechanism that allows for the consideration of economic, social and environmental concerns in managing a basin, it also represents a significant departure from the recognized legal structure of the prior appropriation doctrine. Any method of effecting a future water allocation scheme that deviates from accepted western water law principles must minimize the tendency toward unreasonable speculation in future claims. It if doesn't do this quite clearly, it will be suspect.

What then are the alternatives to the present system of preserving future rights to water for society's valued uses? A search of water laws of other states points out that few, if any, comparable systems have been developed to deal with this problem. Other western states have developed methods of preserving instream flows,[141] but none actually deal with the reservation of water for future consumptive uses in a

manner that resembles the unified approach taken by Montana. In some instances, such as Wyoming's system of appropriation, storage of water or the functioning of the permit system itself act to reserve water for future development.

Several options to the current reservation system have been suggested since the institution of the Yellowstone reservations of 1978. Those who have studied the process in the Yellowstone and who have dealt with the confirmed reservations since then always handle the topic of modifying our present system with kid gloves. The reason for this is that many feel the shortcomings of the current system are not monumental and this being the case, the "Don't fix it if it ain't broke" theory is evoked. The general feeling of satisfaction with the results in the Yellowstone Basin tends to obscure the fact that there may indeed be better options for protecting our other major basins.

Several other methods, some possibly better, some obviously worse, come to mind when the topic of water reservations is discussed. Many states in the West have relied upon basin-wide state plans to define their own future water needs. These types of state water plans often only list projects which may or may not be developed in future years. This sort of inventory of developmental potential would appear to be less complete than the depth and extent of planning and investigating needed to secure a reservation in Montana and as such appears inferior. However, it must be said that a Missouri Basin plan for Montana would have an advantage in terms of cost of development and ease of compilation. This type of claim to future uses may be most prevalent in any attempt by downstream states to make claims against Montana's

water and as such it may be all Montana needs do to counter those claims.

Under another suggested method of reserving water, a "block" reservation system, the Board could approve blocks of water for various subbasins that would be reserved for future demands. This alternative would allow a lead agency to inventory potential future needs in each use category and present all the pertinent data in an application for a reserved block of water. The block could then be partitioned by use category for distribution by the lead agency. This method of reserving water would permit the Board of Natural Resources to assess the future needs of all potential uses simultaneously, as was done in the Yellowstone Basin. Making one agency responsible for the application and distribution of the reserved water could simplify the process and result in more efficient administration. One disadvantage would be the loss of local control and the centralization of allocation power in the lead agency.

Modification of the existing permitting statutes has been suggested to allow for the issuance of permits well in advance of project construction. By requiring much the same information as is now called for by the reservation statute, the state could with some assurance of completion of the project, issue water use permits ten or twenty years before the water is used. This system would allow private individuals to undertake projects with long lead times with the assurance that the water required is reserved for their use. For such a system to be considered worthwhile, progress on the development of the project would have to be incremental to substantiate due diligence in the per-

fection of the permit. A disadvantage to this type of future claim would be the piecemeal approach which it would necessitate for basin-wide planning. Even if the extended permits were limited to highly valued uses, i.e., agriculture and instream, it would be virtually impossible to get an overview of what may happen in a basin's future.

If the state chooses to utilize the existing water reservation process in the Missouri Basin, there are several changes that could help strengthen the resultant claims to future flows.

The Department of Natural Resources and Conservation now has two active applications for water reservations in the Missouri River Basin. In the past, approximately a dozen others have been submitted and subsequently withdrawn.[142] Of the two active applications, one involves municipal water for the city of Lewistown, while the other deals with the reservation of groundwater in Sheridan County. Rather than approaching reservations in an incremental manner, it may be wise to insure that reservations are applied in a concentrated program to the mainstem of the Missouri and its tributaries. This Basin-wide approach could help strengthen the reservations in years to come.

The concept of reserving water for industrial use should also be considered. The existence of such a reservation would allow the state to market industrial water in the future if the decision to pursue water marketing is made. If marketing is not desired, the state at least will have another mechanism to control the growth of industry by requiring industrial users to qualify for the use of reserved industrial flows.

The reservation approval process itself needs to be improved in some ways. From the Yellowstone procedures, valuable lessons can be

taken concerning such items as hearing procedures, public involvement, data presentation, technical assessments and formulation of the Final Board Order. From the ongoing review and reporting process, insights can be gained into how the process worked well and how it didn't.

Another consideration mentioned in the DNRC's water strategy report is that the state may wish to improve the position of the reservants and subsequently that of the state, whose projects move from general concepts to engineering plans by turning the reservations into permits upon completion of the state review process.[143] This change could strengthen Montana's position and diffuse some of the legal concerns about the status of Montana's reserved rights.

The basic question of instituting reservations in the Missouri River Basin will rise again during the 1985 legislature. When, how and to what extent reservations are implemented will be the largest concerns. Address of the issues will invariably be tied to the water marketing debate. The need for future protection issue is inseparably entangled with the marketing question, but cause and effect interactions are not as severe as some claim. Reservation of water in the Missouri does not appear to be essential prior to deciding the marketing issue. Water marketing, at least from the storage in Fort Peck Reservoir, does not necessarily pre-empt future water reservation options. Both issues are important in the overall Basin picture, but neither option excludes the other.

FOOTNOTES FOR CHAPTER 6

139. Montana, DNRC, Water Protection Strategy for Montana.

140. Doney, et al., "Yellowstone Water Reservations".

141. Dewsnup, "Legal Protection of Instream Water Values", p. 39-44.

142. Helena, Montana, interview with Sue Higgins, DNRC offices, 19 April, 1984.

143. Montana, DNRC, Water Protection Strategy for Montana, p. VI-18.

CHAPTER 7

SUMMARY AND DISCUSSION

One of the major issues recently being faced in the United States, the West and Montana is how we manage and use our water resources. An old Chinese proverb states: "He who rules the mountain rules the river." While that may be true in China, Montana's control of the headwaters of three major drainages is not sufficient to protect its water resources from real or perceived threats posed by other states or industrial entities. Realizing this, Montana has developed a unique system in Western Water Law to preserve its water resources for future in-state development. Known as the Montana Water Reservation Process, this system of inventorying and quantifying future water demands has enabled the state to develop and implement a basin-wide water management plan in Montana's Yellowstone Basin.

The reservation system in Montana developed because of a gradual increase in the state's awareness of its governmental responsibility for protecting and enhancing the public interest involved with water resources. To protect the economic opportunities offered by the state's water resources and to preserve the quality of the environment, state policy makers chose to examine innovative approaches to water management. The resultant modifications to Montana's water law constituted a significant break from past practices and reflected the realization that the state's water resources would soon be subjected to mounting pressure from forces outside Montana.

With reservation statutes in place, the state began the long, arduous process of quantifying and prioritizing future uses in the Yellowstone Basin. Adopted by the Board of Natural Resources and Conservation on December 15, 1978, the Yellowstone Reservations are being developed according to the methods prescribed in the reservation determination. Reservants in the Basin have taken different approaches to using their reserved water to use, depending on whether the reservations are consumptive or nonconsumptive. The eventual success of the water reservation system depends on the actual use of the Basin's water for the purposes prescribed during the system's establishment.

Activities that take place beyond Montana's borders can influence management of the state's water resources. The need to monitor the political developments which led to such actions in neighboring states is exemplified by an examination of the ongoing discussions in Wyoming circles concerning the implementation of an instream flow protection strategy for their state. As Montana's upstream neighbor on the major tributaries of the Yellowstone River, Wyoming's move to adopt an instream flow protection mechanism could theoretically benefit Montana in terms of the availability of future water quantities in the Yellowstone Basin. The future decisions made in Wyoming concerning instream protection will be indications of possible value shifts by Wyoming's populace, and these deserve Montana's attention. However, water quantities in the Basin are apportioned between Montana and Wyoming under the provisions of the Yellowstone Compact of 1950, and regardless of Wyoming's decisions on instream protection, it's unlikely that Montana's southern neighbors will curtail their attempts to fully develop their share of the Basin's water supply.

Along with current study of the issues associated with possible adoption of a water marketing strategy for the state, the state must continue to examine the protection of future water uses in the Montana portion of the Missouri Basin. To protect these waters, decision makers must be familiar with the myriad issues affecting the management and future availability of the Basin's water.

For discussion purposes, Montana's Missouri River Basin can conveniently be split at Great Falls. Above the several hydroelectric facilities at Great Falls, the question of water quantities available for any future use at all is being hotly debated. Primarily due to the huge water rights claimed for hydroelectric generation, development of new consumption uses in the Upper Basin may become impossible in the future. The recent issuance of the DNRC Final Administration Order on Canyon Ferry Reservoir maintains that there is still water available for development in the Upper Basin, but the decision will undoubtedly be challenged in the courts.

The ability of the state to condition new water use permits in the Missouri Basin to protect existing water uses is presently being challenged in the courts. Now before the Montana Supreme Court, the case of *Montana Power Company vs. Monforton* questions the effectiveness of Montana's Water Permitting System and raises the side issue of validity of hydropower rights in the Missouri Basin. The decision in this case should provide a much needed glimpse of the Supreme Court's thinking on the water use situation in the Missouri Basin.

The Missouri Basin below Great Falls has a different set of circumstances controlling its future. Perhaps the biggest unknown in this portion of the Basin is the existence of both federal and Indian reserved

rights which have yet to be quantified. While the state has been actively attempting to negotiate the quantities of these rights with both the federal government and tribal representatives since 1979, progress has been slow and no agreements have yet been reached. Before the water resources of the Missouri can be effectively developed and managed, these reserved rights must be quantified.

Another example of a possible major reserved water right in the Missouri Basin is associated with the 149-mile stretch of river protected under the Federal Wild and Scenic Rivers Act. The establishment of an instream flow in this portion of the river may have an adverse effect on the state's ability to pursue future consumptive development upstream of Fort Peck Reservoir. The extent of this effect will not be known until future needs in the Basin are quantified and flow levels for instream purposes are determined.

The quantity of water held in the Fort Peck Reservoir on the Missouri River is important to both the issues of possible water marketing and future water development potential for Montana. The ability of the state to market up to 300,000 acre-feet of water from the reservoir already involves Montana in water sales for industrial uses. The inclusion of the Fort Peck Reservoir under the provisions of the 1944 Flood Control Act allows Montana to argue that the future consumptive development of water resources from the Montana portion of the Missouri River is guaranteed under the Pick-Sloan Plan. The large storage capacity of Fort Peck will remain an important factor in planning and implementing any future management schemes in the Basin.

The question of the validity of applying Montana's water reservation

system to the Missouri River is one not only of effect but of timing. Montana must protect whatever water remains in the Basin after historical uses are quantified if it wishes to keep economic development options open now and in the future. The desire to preserve Montana's options demands that the mechanism chosen to accomplish this goal be designed to afford the maximum protection possible. Adoption or rejection of a water marketing system at this time should not affect Montana's ability to make future attempts to protect undeveloped water.

Water reservations in Montana work well as a planning and management tool among the in-state water users. How well reservations, as currently constructed, would fare in protecting Montana's right to future water development in an interstate arena is an untested matter. The need to evaluate the intertwined issues of the Missouri River Basin before selecting the appropriate protection measures must again be emphasized. If the present reservation system is deemed best for the Missouri Basin, lessons learned in the Yellowstone Basin process must be heeded and adjustments made to the system. Before any decision is made, optional methods of protecting Montana's water for future uses must be catalogued, investigated and creatively evaluated. The resulting decision should ensure a strategy most appropriate to the complex water use situation in the Missouri Basin.

APPENDIX A

YELLOWSTONE RIVER COMPACT, 1950

YELLOWSTONE RIVER COMPACT, 1950

Signatory States: Montana, North Dakota and Wyoming

Rivers Controlled: Yellowstone River and its tributaries (Clarks Fork, Big Horn, Tongue and Powder), excluding Yellowstone National Park.

Ratifications:

Wyo. Stat. §41-511 (1957) [Act of Jan. 27, 1951, Wyo. Sess. Laws p.7]

Mont. Rev. Code §89-903 (1947) [Act of Feb. 13, 1951, Mont. Laws p. 58]

N. D. Century Code Ann. §61-23-01 (1960) [Act of March 7, 1951, N. D. Laws p. 505]

Summary:

The Compact deals basically with dividing the waters of the four tributaries to the Yellowstone River. To all tributaries the following rules apply: 1) existing rights as of January 1, 1950 maintain their status quo; 2) no water may be diverted from the Yellowstone River Basin without consent from all states; 3) existing and future domestic and stock water uses including stock water reservoirs up to a capacity of 20 acre-feet are exempted from provisions of the Compact.

The unappropriated or unused total divertible flow of each tributary after needs for supplemental supply for existing rights are met, is allocated to Wyoming and Montana on a percentage basis.

YELLOWSTONE RIVER COMPACT, 1950

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck	P. [illegible] Leonard
A. W. Bradshaw	Walter M. McLaughlin
H. W. Bunston	Dave M. Manning
John Herzog	Joseph Muggli
John M. Jarussi	Chester E. Onstad
Ashton Jones	Ed F. Parriott
Chris. Josephson	R. R. Renne
A. Wallace Kingsbury	Keith W. Trout

For the State of North Dakota:

I. A. Acker	Einar H. Dahl
J. J. Walsh	

For the State of Wyoming:

L. C. Bishop	N. V. Kurtz
Earl T. Bower	Harry L. Littlefield
J. Harold Cash	R. E. McNally
Ben F. Cochrane	Will G. Metz
Ernest J. Goppert	Mark N. Partridge
Richard L. Greene	Alonzo R. Shreve
E. C. Gwillim	Charles M. Smith
E. J. Johnson	Leonard F. Thornton
Lee E. Keith	M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

A. Where the name of a State is used in this Compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be subject to the terms of this Compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The State of Montana, the State of North Dakota, and the State of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "Commission" and "Yellowstone River Compact Commission" mean the agency created as provided herein for the administration of this Compact.

C. The term "Yellowstone River Basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River System" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "Tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except the Little Bighorn River); the Tongue River; and the Powder River, whose confluences with the Yellowstone River are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.

G. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "Domestic Use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "Stock Water Use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

B. The salaries and necessary expenses of each State representative shall be paid by the respective State; all other expenses incident to the administration of this Compact not borne by the United States shall be allocated to and borne one-half by the State of Wyoming and one-half by the State of Montana.

C. In addition to other powers and duties herein conferred upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective States, and shall compile a report for each year ending September 30 and transmit it to the Governors of the signatory States on or before December 31 of each year.

D. The Secretary of the Army; the Secretary of the Interior; the Secretary of Agriculture; the Chairman, Federal Power Commission; the Secretary of Commerce, or comparable officers of whatever Federal agencies may succeed to the functions and duties of these agencies, and such other Federal officers and officers of appropriate agencies, of the signatory States having services or data useful or necessary to the Compact Commission, shall cooperate, ex-officio, with the Commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the Compact; and these officers may perform such other services related to the Compact as may be mutually agreed upon with the Commission.

E. The Commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree

on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

G. The Commission herein authorized shall have power to sue and be sued in its official capacity in any Federal Court of the signatory States, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The Commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River
   a. To Wyoming.....60%
      To Montana.....40%
   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.
2. Bighorn River (Exclusive of Little Bighorn River)
   a. To Wyoming.....80%
      To Montana.....20%
   b. The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.
3. Tongue River
   a. To Wyoming.....40%
      To Montana.....60%
   b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (Including the Little Powder River)

a. To Wyoming.....42%

To Montana.....58%

b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3, and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date:

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective States and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective States in which situated.

E. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: Provided, That the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the Commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;

Acreage irrigated;

Acreage irrigable under existing works; and

Potentially irrigable lands.

ARTICLE VI

Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: Provided, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: And, provided further, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

B. Each claim hereafter initiated for an appropriation of water in one signatory State for use in another signatory State shall be filed in the Office of the State Engineer of the signatory State in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the State Engineer of the signatory State in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the State in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory State, such adjudications shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.

D. The use of water allocated under Article V of this Compact for projects constructed after the date of this Compact by the United States of America or any of its agencies or instrumentalities, shall be charged as a use by the State in which the use is made: Provided, That such use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII

A lower signatory State shall have the right to acquire in an upper State by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights-of-way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE IX

Should any facilities be constructed by a lower signatory State in an upper signatory State under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this Compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This Compact may be terminated at any time by unanimous consent of the signatory States, and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE XIII

Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, nor the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

ARTICLE XV

This Compact shall become operative when approved by the Legislature of each of the signatory States and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this Compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any State or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, State agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the Compact.

ARTICLE XVII

Should a Court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE XVIII

No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be filed in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each signatory State.

Done at the City of Billings in the State of Montana, this 8th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifty.

Commissioners for the State of Montana:

FRED E. BUCK
A. W. BRADSHAW
H. W. BUNSTON
JOHN HERZOG
JOHN M. JARUSSI
ASHTON JONES
CHRIS. JOSEPHSON
A. WALLACE KINGSBURY
P. F. LEONARD
WALTER M. McLAUGHLIN
DAVE M. MANNING
JOSEPH MUGGLI
CHESTER E. ONSTAD
ED F. PARRIOTT
R. R. RENNE
KEITH W. TROUT

Commissioners for the State of North Dakota:

I. A. ACKER
EINAR H. DAHL
J. J. WALSH

Commissioners for the State of Wyoming:

L. C. BISHOP
EARL T. BOWER
J. HAROLD CASH
N. V. KURTZ
HARRY L. LITTLEFIELD
R. E. McNALLY

APPENDIX B

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